

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ARTHUR LOUIS THOMPSON, JR.,

Defendant-Appellant.

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UNPUBLISHED

May 10, 2011

No. 296957

Tuscola Circuit Court

LC No. 09-011211-FH

Before: WILDER, P.J., and WHITBECK and FORT HOOD, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of ten counts of fourth-degree criminal sexual conduct, MCL 750.317. He was sentenced to concurrent prison terms of 16 to 24 months for each conviction. He appeals as of right. We affirm defendant's convictions but vacate his sentences and remand for resentencing.

**I. FACTS**

The 36-year-old defendant was convicted of sexually assaulting the victim, his 14-year-old next-door neighbor, who was a close friend of his two daughters. At the time of the incidents, the victim and defendant had known each other for five or six years. Many children spent time at defendant's home; the victim was there daily until very late hours. For years, defendant gave the victim backrubs at her request. The victim testified that defendant would have her sit on his lap directly over his "private area." According to the victim, between October 2008 and March 2009, defendant slid his hand below her underwear to touch her butt on five to ten different occasions as he was rubbing her back. When the victim attempted to get off defendant's lap, defendant would pull her back down. Defendant also touched the victim's breasts on five to ten different occasions, and the victim pushed defendant's hand away.

According to the victim, on one occasion, she was sitting on the couch at defendant's house and asked defendant if he wanted a massage. In response, defendant put his head on her lap, pulled a blanket over his head, unzipped and unbuttoned the victim's pants, and put his fingers and his tongue in her vagina. On another occasion, as the victim was driving defendant's car, defendant unbuttoned and unzipped her pants, pulled them down to her thighs, and put his fingers in her vagina. The victim explained that defendant attempted to exchange allowing her to drive his car for touching him. Another incident occurred when the victim was spending the

night at the home of defendant's friend. Defendant came to the house intoxicated after 2:00 a.m., woke the victim and unbuttoned her shorts and, in response, the victim "curled up in a ball and rolled over facing the back of the couch." Defendant was persistent and asked the victim if he could touch her, and she said no. According to the victim, defendant provided her with marijuana sometime in October 2008, and twice provided her with alcohol.

Fourteen-year-old J.H., the victim's close friend, also spent time at defendant's house with other children. J.H. testified that he observed defendant rub the victim's back and then move his hands to her breasts. He also testified that he heard defendant make sexual comments directed toward the victim when she was sitting on his lap. Fourteen-year-old A.M. also regularly frequented defendant's house and sat on defendant's lap a few times at his request, but she was not comfortable with it. A.M. observed the victim sitting on defendant's lap on numerous occasions and, although she saw nothing inappropriate, she heard defendant make sexual comments directed at the victim.

Similarly, fifteen-year-old A.W., a friend of the victim, saw the victim sitting on defendant's lap and give defendant a back rub. A.W. had also sat on defendant's lap a few years previously. Fifteen-year-old S.R., another close friend of the victim, testified that during the period of October 2008 to March 2009, defendant made sexual comments to the victim, and also made sexual comments to S.R. S.R. observed the victim sitting on defendant's lap. S.R. sat on defendant's lap, but it made her feel uncomfortable.

Michigan State Police Trooper J.T. Birkenhauer, a 12-year veteran, interviewed defendant, who was not under arrest at the time. According to Trooper Birkenhauer, defendant admitted that the victim sat on his lap multiple times, that he became aroused when she did, and that he fondled her breasts three or four times. Defendant admitted that he massaged the victim's back and "carried the massage" below her belt line twice as many times as he "grabbed and fondled [her] breasts."

Defendant testified on his own behalf and denied touching the victim inappropriately, touching her breasts and butt, unbuttoning and pulling down her pants, and penetrating her vagina. Defendant explained that he was never alone with the victim, and considered her as one of his own children. Defendant denied providing marijuana or alcohol to the victim. Defendant admitted that he allowed the victim to sit on his lap and gave her about 40 back rubs, but there was no sexual purpose or inappropriate contact. He further admitted that he allowed the victim, who was 14 years old at the time, to drive his car between 10 and 15 times, however, he was never alone with the victim in the car. Defendant denied making any sexual comments, or having any sexual contact with the victim or any other child. Finally, defendant denied confessing to Trooper Birkenhauer that he touched the victim's breasts and buttocks, or that he would get an erection when the victim sat on his lap.

## II. RIGHT TO COUNSEL OF CHOICE

Defendant first argues that the trial court erred by denying his request to adjourn trial so

that he could retain the attorney of his choice. We disagree.

This Court reviews a trial court's decision affecting a defendant's right to an attorney of his choice for an abuse of discretion. *People v Akins*, 259 Mich App 545, 556; 675 NW2d 863 (2003). Likewise, we review a trial court's decision on a motion for a continuance for an abuse of discretion. *People v Steele*, 283 Mich App 472, 484; 769 NW2d 256 (2009). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008).

The Sixth Amendment of the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . the assistance of counsel for his defense." See also Const 1963, art 1, § 20. The United States Supreme Court has held that "an element of this right is the right of a defendant who does not require appointed counsel to choose who will represent him." *United States v Gonzalez-Lopez*, 548 US 140, 144; 126 S Ct 2557; 165 L Ed 2d 409 (2006). The erroneous denial of this right is a structural error requiring reversal, with no harmless-error doctrine available to excuse the error. *Id.* at 150. However, this right is not absolute. *Id.* at 151-152. A trial court has "wide latitude in balancing the right to counsel of choice against the needs of fairness, and against the demands of its calendar." *Id.* at 152 (citations omitted).

In reviewing a trial court's decision to deny a defense counsel's motion to withdraw and to grant a continuance to secure other counsel, the following factors must be considered:

(1) whether the defendant is asserting a constitutional right, (2) whether the defendant has a legitimate reason for asserting the right, such as a bona fide dispute with his attorney, (3) whether the defendant was negligent in asserting his right, (4) whether the defendant is merely attempting to delay trial, and (5) whether the defendant demonstrated prejudice resulting from the trial court's decision. [*People v Echavarria*, 233 Mich App 356, 369; 592 NW2d 737 (1999).]

In this case, the trial court had already adjourned trial once to allow defendant to obtain newly appointed counsel. The trial court did not abuse its discretion when it refused to delay trial a second time to allow defendant to obtain a third attorney. Neither defendant nor his appointed counsel articulated a difference of opinion with regard to a fundamental trial tactic. A mere allegation that defendant lacked confidence in his attorney, unsupported by a substantial reason, does not provide adequate cause to allow counsel to withdraw. See *People v Otter*, 51 Mich App 256, 258-259; 214 NW2d 727 (1974). Likewise, defendant's general disagreements with counsel's representation were insufficient. *Akins*, 259 Mich App at 557-558. Defendant had expressed dissatisfaction that his first appointed counsel had not contacted all witnesses that he recommended. At that juncture, the trial court allowed defendant's first attorney to withdraw, appointed new counsel, adjourned the case for three months, and required that defendant's witnesses appear for trial. As observed by the trial court, defendant raised "the same identical reasons" as those raised three months previously when he again sought to adjourn the second trial.

Furthermore, defense counsel's motion to withdraw was made on the day before the second trial date. Defendant asserts that he was not negligent because he sought to retain an attorney only after receiving approval for a Social Security settlement that enabled him to have the financial resources to pay for an attorney. At the hearing on the motion, defendant assured the court that he had spoken with his prospective attorney and was scheduled to meet him later that same day. Despite the lateness of the request, the trial court informed defendant that he could retain new counsel if counsel timely filed an appearance. However, counsel never filed the required appearance. The trial court's reluctance to adjourn the trial a second time was reasonable. Trial had already been adjourned once, the jury and witnesses were scheduled, and the prosecutor was ready to proceed. A substitution of counsel at that point would have unreasonably delayed the judicial process. We note that defendant had three months to request new counsel if a bona fide dispute with appointed counsel actually existed. Under the circumstances, the impending change in defendant's financial situation did not excuse the lateness of counsel's motion to withdraw. For these reasons, defendant was not denied his right to retain counsel of his choice, and the trial court's decision to proceed with trial, over defendant's request for a continuance to enable him to hire a new attorney, was not an abuse of discretion.

### III. ADMISSION OF OTHER ACTS

Defendant argues that his convictions must be reversed because the trial court erred in admitting evidence that he (1) made sexual comments to the victim and teenager SR, and (2) allowed teenage SR to sit on his lap in his home. Defendant contends that the evidence was improperly admitted under MRE 404(b). We disagree. A trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003).

#### A. SEXUAL COMMENTS

At trial, the prosecutor elicited testimony that defendant made sexual comments to the victim and to teenager SR. This testimony involves defendant's statements, not his acts. "[A] prior statement does not constitute a prior bad act coming under MRE 404(b) because it is just that, a prior statement and not a prior bad act." *People v Rushlow*, 179 Mich App 172, 176; 445 NW2d 222 (1989). Consequently, "the appropriate analysis is whether the prior statement is relevant, and if so whether its probative value outweighs its potential prejudicial effect." *People v Goddard*, 429 Mich 505, 518; 418 NW2d 881 (1988).

Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401; *Yost*, 278 Mich App at 355. Relevant evidence may be excluded under MRE 403 "if its probative value is substantially outweighed by the danger of unfair prejudice." MRE 403 is not intended to exclude "damaging" evidence, as any relevant evidence will be damaging to some extent. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). Instead, it "is only when the probative value is *substantially outweighed* by the danger of unfair prejudice that evidence is excluded." *Id.* (Emphasis in the original.) Unfair prejudice exists where there is "a danger that marginally probative evidence will be given undue or pre-

emptive weight by the jury” or “it would be inequitable to allow the proponent of the evidence to use it.” *Id.* at 75-76; *People v McGuffey*, 251 Mich App 155, 163; 649 NW2d 801 (2002).

In addition to fourth-degree CSC, defendant was also charged with accosting children for immoral purposes, MCL 750.145a. The principal issue at trial was whether defendant had inappropriate sexual contact with the victim. Defendant did not dispute that there was some physical contact with the victim, but denied that it was sexual. Evidence that defendant made sexual comments to the victim and another teenage girl, who was in his home and sat on his lap like the victim, was relevant to defendant’s intent. The evidence was probative of defendant’s sexual interest in the teenage girls, and was relevant to challenge his assertion that his contact with the children in his home was innocuous. The evidence was not inadmissible simply because the nature of the evidence was potentially prejudicial. Defendant has not demonstrated that he was unfairly prejudiced by the properly admitted evidence. The prosecutor focused on the proper purpose for which the evidence was admissible. Under the circumstances, the trial court’s decision to admit the evidence of defendant’s comments did not fall outside the range of reasonable and principled outcomes. *Yost*, 278 Mich App at 379.

## 2. MRE 404(b)<sup>1</sup>

MRE 404(b)(1) prohibits “evidence of other crimes, wrongs, or acts” to prove a defendant’s character or propensity to commit the charged crime. See also *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). But other acts evidence is admissible under MRE 404(b)(1) if it is (1) offered for a proper purpose, i.e., one other than to prove the defendant’s character or propensity to commit the crime, (2) relevant to an issue or fact of consequence at trial, and (3) sufficiently probative to outweigh the danger of unfair prejudice, pursuant to MRE 403. *People v Starr*, 457 Mich 490, 496-497; 577 NW2d 673 (1998); *People v VanderVliet*, 444 Mich 52, 55, 63-64, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).

The prosecution elicited evidence that defendant had SR, to whom defendant also made sexual comments, sit on his lap in his home to prove a common scheme or plan in doing an act, and to prove defendant’s intent. These are proper purposes under MRE 404(b). In *People v Sabin (After Remand)*, 463 Mich 43, 63; 614 NW2d 888 (2000), our Supreme Court explained that “evidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system.” See also *People v Hine*, 467 Mich 242, 251; 650 NW2d 659 (2002). The *Sabin* Court noted that “[g]eneral similarity between the charged and uncharged acts does not, however, by itself, establish a plan, scheme, or system used to commit the acts.” *Sabin*, 463 Mich at 64. “For other acts evidence to be admissible there must be such a concurrence of common features that the uncharged and charged acts are naturally explained as individual manifestations of a general plan.” *Hine*, 467 Mich at 251; see also *Sabin*, 463 Mich at 64-65. But “distinctive and unusual features are not

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<sup>1</sup> Although plaintiff discusses the propriety of admitting the “other acts” evidence under MCL 768.27a, the trial court admitted the evidence only under MRE 404(b).

required to establish the existence of a common design or plan. The evidence of uncharged acts needs only to support the inference that the defendant employed the common plan in committing the charged offense.” *Hine*, 467 Mich at 253-254; *Sabin*, 463 Mich at 65-66.

The evidence was not offered to show that defendant had a bad character. Rather, it was probative of defendant’s common scheme, plan, or system of taking advantage of similarly situated teenage girls. The commonality of the circumstances of the other acts evidence and the charged crimes are sufficiently similar to establish a scheme, plan, or system in doing an act. In both the other acts and the charged crimes, there was a concurrence of common features that defendant utilized against the teenage girls. Defendant befriended and socialized with the young girls in his home, created an enticing environment that gave him access to them, and had the girls sit in his lap and hold them and rub their backs. While defendant’s actions made SR feel uncomfortable, his actions continued and escalated with the victim. The commonality of the circumstances of the other acts evidence and the charged crimes are sufficiently similar that the jury could infer that defendant had a system that involved taking advantage of his relationship with young girls to perpetrate inappropriate sexual contact. Defendant has not demonstrated that he was unfairly prejudiced by the properly admitted evidence. MRE 403. The trial court’s decision to admit the other acts was within the range of reasonable and principled outcomes. *Yost*, 278 Mich App at 379.

#### IV. SENTENCING

Lastly, defendant argues that he is entitled to be resentenced because the sentencing guidelines range was 0 to 17 months and, instead of sentencing him to an intermediate sanction, the trial court imposed a prison sentence without articulating substantial and compelling reasons for the sentence. We agree.

Under the sentencing guidelines statute, the trial court must ordinarily impose a minimum sentence within the sentencing guidelines range. MCL 769.34(2) and (3). In this case, the sentencing guidelines range was 0 to 17 months. If the upper limit of the recommended range is 18 months or less,

the court shall impose an intermediate sanction unless the court states on the record a substantial and compelling reason to sentence the individual to the jurisdiction of the department of corrections. An intermediate sanction may include a jail term that does not exceed the upper limit of the recommended minimum sentence range or 12 months, whichever is less. [MCL 769.34(4)(a).]

Even though the 16-month minimum sentence does not exceed the upper end of the guidelines range, MCL 769.34(4)(a) required the trial court to impose an intermediate sanction unless it provided a substantial and compelling reason to impose a prison sentence. The court did not set forth any substantial and compelling reasons for its sentence. Indeed, the court did not acknowledge at sentencing or indicate on the sentencing information report that its sentence was a departure. Consequently, defendant is entitled to be resentenced. MCL 769.34(11). We therefore vacate defendant’s sentences and remand for resentencing. On remand, the trial court must sentence defendant to an intermediate sanction, or articulate on the record a substantial and compelling reason for imposing a prison sentence.

Affirmed in part and remanded for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Kurtis T. Wilder  
/s/ William C. Whitbeck  
/s/ Karen M. Fort Hood